# Petition

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FILED
DEC 24 1981
ALEXANDER L. STEVAS,
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81-1193
No.

# In the Supreme Court of the United States

October Term, 1981

MARY JUNE SPEIGHT,

*Petitioner,*

vs.

STATE OF GEORGIA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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## QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit the State's knowing use of testimony so materially in conflict with all other testimony as to be perjury in order to obtain a criminal conviction?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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No._____

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| | |
|---|---|
| MARY JUNE SPEIGHT, | ) |
| | ) |
| Petitioner, | ) |
| v. | ) |
| | ) |
| THE STATE OF GEORGIA, | ) |
| | ) |
| Respondent. | ) |

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PETITION FOR WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

Comes Now Petitioner, MARY JUNE SPEIGHT, by and through her undersigned counsel of record and prays that this Court issue a Writ of Certiorari to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on May 20, 1981.

## OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 159 Ga. App. 5 , ____S.E.2d_____(1981), and is set forth in Appendix "D".

## JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on May 20, 1981. An Application for rehearing was timely filed and denied on June 19, 1981. Copy of said denial is set forth in Appendix "C". Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on September 8, 1981. Copy of said denial is set forth herein in Appendix "B". A motion for reconsideration was timely filed and denied October 26, 1981. Copy of said denial is set forth herein in Appendix "A". This Court's jurisdiction is invoked under Title 28, United States Code § 1257 (3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

In the late afternoon of October 11, 1979 a 1977 Mercury automobile allegedly owned by Petitioner and containing seven garbage bags of marijuana in the trunk was involved in an eight car accident on Interstate Highway 75 in Monroe County, Georgia

(TT-346, 347).* While stopped on the Interstate due to traffic congestion, the car had been struck in the rear by a tractor trailer (MT-36). The impact rendered the car undriveable (MT-35). The trunk lid was buckled and pushed up--opening an 8 x 12 inch hole on the passenger side and a smaller hole on the driver's side (MT-36, 37).

Trooper Donald Cadle of the Georgia State Patrol investigated the accident and wrote the accident report on this car (TT-346, 347). At trial he testified that he remembered seeing the Petitioner and the 1977 Mercury automobile; and that he was close (within 5-10 feet) to the car and got the tag number off the car (TT-349). Although it was not dark and he was familiar with both the appearance and the smell of marijuana, he observed no black or dark

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* The Record below is cited (R- ); the Transcript of the Motion to Suppress (MT- ); the Trial Transcript (TT- ); and the Appendix (A- ).

green garbage bags; nor did he smell marijuana or notice any sprigs of marijuana sticking out (TT-350, 353).

Another witness who observed the 1977 Mercury at the scene of the accident was David Buice (MT-36). Buice was working for his brother's garage in Forsyth, Georgia as a wrecker driver and helped hook up the car at the accident scene (TT-172). He first observed the 1977 Mercury sitting in the northbound lane of Interstate 75 (MT-36). The trunk lid was "bucked" up on the passenger side 8 to 10 inches and on the driver's side 1 inch (MT-36-38). He was around the car for 3 or 4 minutes hooking it up to the wrecker and it was still daylight at this time (TT-194). Like Trooper Cadle he never observed any green bags (MT-40). He never saw any green leafy material or twigs sticking out the hole (MT-40).

Another employee of the garage then towed the car to the garage (MT-35; TT-172). Buice then hooked the car up to his

wrecker to tow it to Ashburn, Georgia; however, another call for assistance came in so Buice unhooked the car and went to the new accident (TT-195). After returning, Buice again hooked up the car and towed it to Ashburn, Georgia. After exiting Interstate 75, the wrecker with the car in tow pulled into the B and B Standard station where Petitioner used the pay telephone (MT-41).

Lamar Whiddon, the Sheriff of Turner County, testified that he received an anonymous phone call at approximiately 9:30 p.m. that night to the effect that a car involved in a Monroe County wreck was going to be towed "through Ashburn" (TT-33) (MT-5). Sheriff Whiddon testified the caller said that:

> There would be a 1977 silver gray Mercury being towed back through the county with a rear end collision and it would be loaded with junk. (MT-5).

He then called the Georgia State Patrol post in Monroe County, Georgia and con-

firmed that there had been an eight car pileup (MT-5).

The Sheriff went to the exit at the Interstate to investigate (TT-34-35) (MT-15). He remained there until 11:30 P.M., when he left to go one mile to a store to buy some cigarettes. Upon his return, he spotted a car in tow (MT-15), and went over to investigate (MT-6). Sheriff Whiddon testified that he drove up to the car and that from his seat in the patrol car he could see inside the trunk where he saw "...three plastic bags torn with sprigs of green leafy substance sticking out." (MT-6). The Sheriff claimed he could see the substance while seated inside his car (MT-6), even though the Mercury was being towed from the rear (MT-20), with its rear off the ground (TT-172), and he was six or seven feet away (TT-80). The Sheriff said it "resembled marijuana." (TT-35)(MT-6, 8-9). Sheriff Whiddon then spoke with Petitioner who had been on the pay phone,

asking her if she were lost. Petitioner replied "No." (TT-39) (MT-7).

Mr. Buice testified in direct and unexplainable contrast to the testimony of the Sheriff. While stopped at the B and B Standard station he was within 5 to 6 feet of the towed car (MT-41). He never observed any green or black bags nor did he observe any sticks or green leafy substance hanging out (MT-41, 42).

In direct and unexplainable contrast to the Sheriff's testimony Petitioner also described the appearance of the car while at the scene of the wreck and at the B and B Standard station (MT-54, 55). At the scene of the accident she observed no green or black bags, no green leafy material, and no twigs (MT-53, 54). Nor were there any bags protruding or hanging out of the trunk (MT-54). She testified that immediately after the wreck she ran to the rear of the car and placed a brown overnight bag in the large hole on the pasenger side (MT-48, 49).

Furthermore, she testified that there was no change in the condition of the trunk area of the car when it was stopped at the B and B Standard station outside of Ashburn (MT-55).

The Sheriff let the tow truck proceed to Ashburn where he stopped it with help from other officers (TT-39) (MT-10). They approached the car and Sheriff Whiddon testified that he pulled a sprig out of one of the bags, smelled it and then "suspected it being marijuana" (MT-11):

> As I walked up by their car I just pulled a sprig of the suspected marijuana from the bag and smelled it and walked up to the car and opened the door. Larry Barfield and Scotty Ireland was present and I told them they was charged with possession. (TT-39).

The Sheriff testified he didn't have to reach inside the trunk because the bags were bulging out of the trunk (MT-11); that the sprigs sticking out were very easy to see and "real obvious" (MT-25). The car was then towed to the jail where the trunk

was opened and seven plastic garbage bags of marijuana were removed from the trunk (TT-40) (MT-28). Sheriff Whiddon testified that there was no warrant or consent to search (MT-32). As for the bags containing the marijuana the Sheriff said, "You couldn't see through them, only they were torn." (MT-28).

Concerning the appearance of the car when stopped in Ashburn, the other two witnesses testified in direct and unexplainable contrast to Sheriff Whiddon: (1) Larry Barfield and (2) David Buice. Buice's testimony is contradictory on the issue of whether the overnight bag and garbage bag were first pulled out at the initial stop in Ashburn or at the police station; however, he consistently testified that no marijuana was observable until the police began removing items from the trunk. Buice testified that after being stopped by the police, he observed the police pull the

brown overnight bag from the hole on the passenger side and set it on top of the car. Then they reached in and pulled one of the green garbage bags out. (MT-42, 44) (TT-191, 197, 201). It was only then that he realized there was any marijuana in the trunk (TT-196).

Larry Barfield, a sergeant with the Ashburn police department who assisted in stopping the wrecker, also testified in direct and unexplained contrast to Sheriff Whiddon. Called by the State to buttress the Sheriff's testimony, Barfield testified that after he pulled the tow truck and car over, he and the Sheriff walked up to the rear of the car together (MT-66); that at that time he did not see any marijuana--even though he had his nose "right down on it" in the trunk area (MT-68)--because the marijuana was not found until the car was towed to the jail and searched (MT-68); that the Sheriff did not say anything about

seeing marijuana until they conducted the full search (MT-69); and that he was familiar with marijuana, having seen it a "thousand times" (MT-69). Barfield said the marijuana was "discovered" because when they stopped the car they investigated and smelled marijuana:

> We walked to the back of the wrecker and looked around the car and smelled a strong odor back there. The truck was bowed open where it had been hit and I told the Sheriff, 'This smells like marijuana', you know, 'here at the back' which they was green trash bags and you could see clear like there. I put my nose, my head, down there to where the trunk was bowed open and the Sheriff did too and he said he believed it was marijuana too. We told the wrecker driver and all of them to come up to the jail house, follow us up to the jail house. (MT-66).

Even though Barfield said he smelled it, he testified that he did not see any marijuana until it was found in a complete search of the car at the jail (MT-68).

After the wrecker towed the car to the police station, Sheriff Whiddon attempted

to jerk the trunk open (TT-40). After failing, he had Buice jerk it open (TT-40). The bags and suspected marijuana were removed and then transported to the "death cell" in the Turner County Jail (TT-55). There they remained for about one week at which time the garbage bags and contents were moved to a wooden building near the jail which was used primarily as the Civil Defense storage building (TT-91).

In the late evening of November 9, 1981 Garland Whiddon, the Sheriff's son, and three companions burglarized the wooden building and removed four of the bags of suspected marijuana (TT-208). They were taken and hidden in some woods on the outskirts of town (TT-212-213). After a few hours the Sheriff's son went and moved the bags to another location (TT-214). They remained there until the afternoon of the next day when the Sheriff's son got them and brought them back to the Sheriff (TT-

217). The bags and contents were then placed back in the "death cell" (TT-274), where they remained until their destruction pursuant to an ex parte order of a superior court judge (TT-15-19, 86).

Petitioner's first appearance with counsel was at the preliminary hearing on November 16, 1981 (R-4-41). It was here that Sheriff Whiddon first gave testimony that the marijuana was visible at both the B and B Standard station and the arrest location (R-12, 30, 23, 37). Sheriff Whiddon later testified at the hearing on Petitioner's motion to supress that due to their theft he could not say that the bags were then in their same condition that they were in at the time of their seizure (MT-29).

Petitioner was indicted on January 7, 1980 (R-42). The motion to suppress hearing was held on January 16, 1980 (MT-2-75).

The trial judge overruled Petitioner's motion to suppress at the conclusion of the hearing (MT-70). The stated basis of his ruling was:

> I think the Sheriff at the time that he saw, as he testified, in plain view the green leafy material which he believed to be marijuana and with his background and knowledge of what marijuana was, as testified to, I think that he had a right to continue from that point on in the search. I'm going to overrule the motion. (MT-70).

Petitioner was tried on September 8, 9, 10, 1980. It was here that Petitioner first learned of the destruction of the bags and their contents [except a small amount preserved for scientific examination] (TT-15-19). Petitioner made a motion to dismiss for the destruction of the evidence; but the motion was overruled (TT-19). When the preserved marijuana was offered into evidence Petitioner renewed her objection to its admission (TT-318-320). The trial court admitted only that

alleged marijuana which came out of the bags that were not taken in the burglary by the Sheriff's son (TT-327-329). The jury found Petitioner guilty on September 10, 1980 (TT-435) (R-42). On September 12, 1980 Petitioner was sentenced by the trial court to three years imprisonment (R-85). Counsel for Petitioner filed a notice of appeal (R-1) and moved the trial court for a supersedeas bond pending the outcome of her appeal (R-88). The trial court refused to grant Petitioner a supersedeas bond (R-95).

Petitioner appealed the denial of her motion for supersedeas bond (R-97). The Georgia Court of Appeals remanded the case to the trial court on September 25, 1980 for an Order in compliance with applicable state law (A-50a) (R-98). The trial court again denied Petitioner a supersedeas bond (A-43a) (R-105). Petitioner again sought an appeal bond from the Georgia Court of

Appeals; however, the court denied Petitioner's motion on October 15, 1980 (A-41a). Petitioner sought a writ of certiorari from the Supreme Court of Georgia. The Supreme Court of Georgia denied the writ of certiorari on October 28, 1980 (A-40a).

Petitioner filed Motion for Bond with the United States District Court for the Middle District of Georgia seeking an appeal bond on October 31, 1980. On November 7, 1980 Honorable Wilbur D. Owens, Jr., United States District Judge, ordered Petitioner's enlargement on a reasonable appeal bond (A-23a). Petitioner was released on bond on November 10, 1980.

Meanwhile, Petitioner appealed her conviction to the Georgia Court of Appeals. The Georgia Court of Appeals affirmed Petitioner's conviction in a written opinion on May 20, 1981 (A-4a). Petitioner filed a motion for rehearing. This motion was denied on June 19, 1981 (A-3a). Petitioner

then sought a writ of certiorari from the Supreme Court of Georgia. The Supreme Court of Georgia denied the writ on September 8, 1981 (A-2a). Petitioner's Motion for Reconsideration was also denied by the Supreme Court of Georgia on October 26, 1981, (A-1a); however, Justices Hill and Smith dissented. Petitioner filed with the Georgia Court of Appeals a notice of intent to apply for a writ of certiorari from this Court on October 29, 1981.

## REASON FOR GRANTING THE WRIT

The decision of the Georgia Court of Appeals upholding Petitioner's conviction is in conflict with appicable decisions by this Court that a conviction obtained through the use of false evidence, known to be such by the representatives of the State, must fall under the Fourteenth Amendment. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S.

28 (1957); and Mooney v. Holohan, 294 U.S. 103 (1935). To establish a violation of the Fourteenth Amendment there are four showings that must be made: (1) perjured testimony; (2) on a material point; (3) its knowing use by the State against the accused; and (4) prejudice suffered by the accused by virtue of the use of such testimony.

A. The Testimony Was Perjured

The testimony of Sheriff Whiddon was so inconsistent with that of every other witness that the only explanation is that it was perjured. In contrast to all other witnesses at the hearing on the motion to suppress Sheriff Whidden testified:

> A: You didn't have to reach inside the trunk, because it was bulged out where the car had been hit in the rear. The bags were bulged and busted and I pulled a sprig from the bag. (MT-11).
>
> ...
>
> A: Plastic bags being bulged out on both sides of the trunk. (MT-18).
>
> ...

A: I could see plastic bags that was busted and sprigs of green leafy substance sticking out. (MT-21).

...

Q: ..., how many different places was it sticking out of?

A: Two or three.

Q: Two or three?

A: Yes.

...

A: I don't think it was probably bulging out over the side of the car. It was bulging out over the back fender. It didn't go out far enough so that somebody who would run by would swipe it out. (Emphasis added).

Q: But it was outside?

A: Yes.

Q: Outside of the trunk enclosure?

A: Yes.

Q: Was marijuana falling out of it; or hanging out of it?

A: There was sprigs just sticking out.

Q: Sticking out?

A: Yes.

Q: And it was pretty easy to see?

A: Yes.

Q: I mean, you would have to be pretty blind to miss it?

A: Yes.

Q: How about on the other side, when you got around on the telephone side, was the condition pretty much the same?

A: Well, I wouldn't say that I could see sprigs on the other side, but the bulge was there.

Q: You said earlier that you could see something that you thought was green leafy material or what you thought was marijuana, didn't you, Sheriff?

A: If I did, I'll say it again.

Q: No, what do you remember?

A: My memory is that it was there.

Q: Okay, was it sticking out much the same way?

A: Yes, about the same way all the way around.

Q: Pretty easily seen?

A: Yes.

Q: In fact, you saw it all the way up at your car, didn't you?

A: Yes.

Q: It was pretty obvious?

A: Real obvious. (MT-23-25)

The testimony of all other witnesses [(1) the wrecker driver, David Buice, who was around the rear of the car two hours in both daylight and darkness (MT-49); (2) the Georgia State Patrol Trooper Donald Cadle who investigated in daylight and wrote an accident report on the damage to the car (TT-347); (3) the Ashburn police officer Larry Barfield, who "put his head down" to the damaged area and could only smell marijuana (MT-66); and (4) the Petitioner, herself] all contradicted this story of Sheriff Whiddon. The only resolution of this conflict is that the Sheriff lied.

Although both the trial court (MT- 70) and the Georgia Court of Appeals (A-9a-14a) ruled against Petitioner, this Court is not bound by that ruling. The duty to make its own independent examination of the record when federal constitutional deprivations are alleged has long been recognized by

this Court. Martin v. Hunter's Lessee, 1 Wheat. 304, 4 LEd 97 (1816). In Napue v. Illinois, supra, at 272 this Court, quoting Niemotko v. State of Maryland, 340 U.S. 268, 271 (1951) reaffirmed the principle that:

> In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.

The failure of the trial court (A-43a-49a) and the Georgia Court of Appeals (A-41a-42a) to even follow state law concerning supersedeas bonds is indicative of the type of "full and fair hearing" Petitioner received on appeal at her motion to suppress. Reviewing the bond proceedings, the District Court found:

> In sum, the order of the state trial judge [later affirmed by the Georgia Court of Appeals] served to arbitrarily deny petitioner the right to have an appropriate bail set in accordance with state law. (A-38a).

The trial court's ruling [also affirmed by the Georgia Court of Appeals (A-9a-14)] that the Sheriff saw the marijuana in plain view in the face of the totally contradictory testimony by every other witness was just as arbitrary and unreasonable as the ruling denying Petitioner a supersedeas bond, and this Court should not let such action go unremedied.

The one opportunity Petitioner had to contradict the Sheriff's testimony by means of the physical evidence was destroyed by the Sheriff's son's actions in stealing the garbage bags of marijuana prior to the preliminary hearing. At the motion to suppress hearing the Sheriff admitted he couldn't guarantee that the bags were in the same condition (MT-28). The pictures taken of the bags shortly after their seizure offer no help (TT-83-84).

B. The Testimony Was Material

There can be no question that the perjured testimony of Sheriff Whiddon was material. Without this testimony the stop of Petitioner in Ashburn, her arrest, and the search of the 1977 Mercury's trunk without a warrant or consent were in violation of the Fourth Amendment to the United States Constitution. The trial court's ruling upholding the search specifically pointed this out:

> I think that he had a right to continue the search having seen the green leafy substance which he believed to be marijuana (MT-70).

On appeal the Georgia Court of Appeals upheld the search based on this same testimony (A-9a-14a).

C. Knowing Use of the Testimony By the State

Sheriff Whiddon first gave this testimony at the probable cause hearing (Ga. Code Ann § 27-407) on November 16, 1979 (R-4-41). The testimony was again repeated

at the hearing on the motion to suppress (MT-4-33). After the Sheriff's testimony, the wrecker driver and the Petitioner herself were called to testify (MT-34-58). The contradictions first became apparent at this point. The State recalled the Sheriff (MT-60-64); then called Larry Barfield, the Ashburn police officer (MT-65-69). As pointed out earlier Barfield totally contradicted the Sheriff. Counsel argued the motion (unreported) and the trial court overruled the motion (MT-70).

In the face of these unexplained contradictions the State continued to use this testimony. At trial the Sheriff again testified giving this same version (TT-6-28). Counsel for Petitioner again objected to the admission of this evidence (TT-319, 320); however the trial court overruled the objection and admitted the evidence (TT-327, 333). Therefore even in the face of these unexplainable contradictions, the

State continued to use this testimony to secure the Petitioner's conviction at trial.

D. Prejudice Suffered By Petitioner

Clearly, Petitioner has been prejudiced. The testimony was relied on to deny Petitioner's motion to suppress and to secure her felony conviction for a violation of the Georgia Controlled Substances Act (Ga. Code Ann. § 79A-801 et seq.). But for the intervention of the United States District Court for the Middle District of Georgia, she would be presently in jail serving the three year sentence imposed by the trial court.

## CONCLUSION

Although not originally soliciting the false evidence the State has utilized the perjured testimony of Lamar Whiddon to secure the Petitioner's conviction. This was not a case where the evidence was con-

flicting and the trier of fact had to make a choice. Whiddon's testimony was so totally out of line with that of two police officers, a wrecker driver and Petitioner that it should have been repudiated by the State and never placed before the jury. The offense with which Petitioner was charged infected the ability of the trial court to objectively rule on this issue, as well as Petitioner's later motion for supersedeas bond. The Georgia Court of Appeals also refused to acknowledge this; however, properly acting on the supersedeas bond issue only, the United States District Court acknowledged this and overruled the state courts. This Court should grant Petitioner a Writ of Certiorari to remedy the denial of due process demonstrated by the record herein.

This 24th day of December, 1981.

Respectfully submitted,

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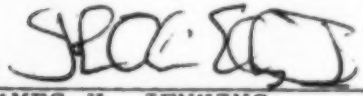
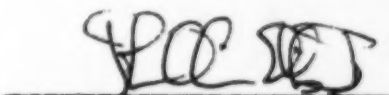


JAMES K. JENKINS
JOHN OLIVER ELLIS, JR.
Attorneys for Petitioner
MARY JUNE SPEIGHT

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari to the Georgia Court of Appeals and Appendix upon the Honorable Michael Bowers, Attorney General, State of Georgia, Judicial Building, Room 132, 40 Capitol Square, S.W., Atlanta, Georgia 30334 and upon the Honorable Thomas H. Pittman, District Attorney, Tifton Judicial Circuit, Post Office Box 1252, Tifton, Georgia 31794.

This 24th day of December, 1981.



JOHN OLIVER ELLIS, JR.

# Appendix

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No.

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STATE OF GEORGIA,

*Respondent.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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Order of the Court of Appeals of Georgia Denying Petitioner's Motion for Supersedeas Bond Pending Appeal, Decided October 15, 1980. 41a

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Order of the Turner County, Georgia Superior Court Denying Petitoner's Motion for Supersedeas Bond Pending Appeal, Issued October 9, 1980. 43a

Appendix I

Order of the Court of Appeals of Georgia Remanding To the the Turner County, Georgia Superior Court Petitioner's Motion for Supersedeas Bond Pending Appeal, Issued September 25, 1980. 50a

APPENDIX A

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA 10/26/81

The motion for a reconsideration was denied today:

Case No. 37824 Speight v. State

Hill, P. J. & Smith, J., dissent

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta SEP 8 1981

Case No. 37824. Speight v. The State

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The Supreme Court today denied the writ of certiorari in this case.

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JORDAN, C. J., HILL, P.J., MARHSALL, CLARKE, SMITH & GREGORY, JJ., CONCUR.

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Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX C

COURT OF APPEALS
of the State of Georgia
ATLANTA, June 19, 1981

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

61518. Mary June Speight v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the
State of Georgia

CLERK'S OFFICE, ATLANTA
June 19 1981

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Alton Hawk CLERK.

APPENDIX D

May 20, 1981

February

AFFIRMED

61518. SPEIGHT v. THE STATE. McM-52

McMURRAY, Presiding Judge.

Defendant was indicted, tried and convicted of violation of the Georgia Controlled Substances Act (unlawful possession of more than one ounce of marijuana). Defendant appeals. Held:

1. Defendant objected to the admission into evidence of the certified registration of the 1977 Mercury automobile which showed her as owner of the vehicle. Defendant's objection is stated in terms of a lack of qualifying evidence and failure to show that the document was made in the regular course of business. See in this regard Stewart v. State, 246 Ga. 70, 73-74 (3) (268 SE2d 906); Grogins v. State, 154 Ga.

App. 606, 607 (3) (269 SE2d 98); Code Ann. § 38-711 (Ga. L. 1952, p. 177). The document in question was a Minnesota registration certified by a duly appointed agent of the Commissioner of the Minnesota Department of Public Safety, Driver and Vehicle Services in charge of motor vehicle records. The document was properly admitted under the provisions of Code Ann. § 38-360 (b) (Ga. L. 1973, pp. 299,. 301) with reference to proof of nonjudicial books and records of other states. See 28 U.S.C.A. § 1739.

Defendant contends that the trial court erred in failing to grant her motion for directed verdict that the evidence at trial failed to establish her possession of marijuana. Defendant argues that the state has merely shown the presence of contraband in a vehicle which she occupied and that there is no evidence of her possession of the marijuana beyond her proximity with the

contraband. Defendant acknowledges, however, the general rule that where immediate and exclusive possession of an automobile is shown an inference is authorized that the owner of the vehicle is the owner of what is contained therein. Defendant relies upon the exception in Farmer v. State, 152 Ga. App. 792, 795 (264 SE2d 235), that such an inference does not arise where the defendant has not been in possession of the vehicle for the period of time prior to the discovery of the contraband or where it is shown that others have access to it. See also Moore v. State, 155 Ga. App. 149, 150-151 (1) (270 SE2d 339); Autry v. State, 150 Ga. App. 584, 586 (258 SE2d 268); Bradley v. State, 137 Ga. App. 670, 671 (1) (224 SE2d 778); Person v. State, 155 Ga. App. 106, 107 (270 SE2d 319); Elrod v. State, 128 Ga. App. 250, 251 (1) (196 SE2d 360).

There is no evidence as to anyone other than defendant having such access to the vehicle as to enable them to place over 160 pounds of marijuana in the trunk of the vehicle without the defendant's knowledge and consent. There is some evidence that defendant's companion may have been driving the vehicle at the time of the collision. However, as to defendant's companion, the arresting sheriff testified to a conversation with defendant during which she inquired as to why her companion was charged with possession of marijuana. The sheriff told her it was because she (the defendant) had told him the marijuana was not hers (defendant's), at which point the defendant told the sheriff, "He [her companion] didn't know anything about it. He was just along for the ride."

The sheriff also testified to overhearing another conversation of defendant when she was allowed to make a telephone call.

The arresting sheriff remained nearby to make sure she made her call collect. During this conversation the sheriff overheard defendant say, "I got caught with this s--t [expletive]." The arresting sheriff's testimony as to statements made by defendant when considered together with her ownership of the vehicle and lack of evidence of access by another of such a nature as would allow them to place the contraband in the trunk of the vehicle without defendant's knowledge and consent are sufficient proof of defendant's possession of the contents of the trunk of the vehicle beyond a reasonable doubt.

After careful review of the entire record and transcript we find that a rational trier of fact could reasonably have found from the evidence adduced at trial proof of guilt of the defendant beyond a reasonable doubt of the offense of violation of the Georgia Controlled

Substances Act (unlawful possession of more than one ounce of marijuana). See Driggers v. State, 244 Ga. 160, 161 (1) (259 SE2d 133); Moses v. State, 245 Ga. 180, 181 (1) (263 SE2d 916); Sanders v. State, 246 Ga. 42 (1) (268 SE2d 628); Jones v. State, 154 Ga. App. 806, 807 (1) (270 SE2d 201). The trial court did not err in refusing to grant defendant's motion for directed verdict.

2. Defendant contends that the trial court erred in failing to grant her motion to suppress relating to a warrantless search conducted of her automobile. The state's evidence on the motion to suppress hearing was that the sheriff of Turner County received an anonymous telephone tip that a 1977 silver gray Mercury automobile which had been involved in a collision would shortly be towed through Ashburn, Turner County, Georgia, and that the vehicle was loaded with "junk." The sheriff

personally established a lookout and eventually spotted the described vehicle which was attached to a tow truck parked at a gas station in Ashburn. The sheriff drove by within 2 feet of the parked vehicle and saw that the rear of the car was heavily damaged as from a collision and that due to the damage to the car, including the buckling of the metal of the rear of the car and the trunk lid, there was a hole through which he could see torn plastic garbage bags with a green leafy substance protruding ("sprigs just sticking out"). This green leafy substance appeared to the sheriff, in the light of his law enforcement experience, to be marijuana. The sheriff, after asking defendant if she was lost and receiving a negative response, withdrew and radioed for assistance. After additional law enforcement officers had gathered, the tow truck and its cargo, which was then under way, was stopped, and the driver of the

tow truck, defendant and a companion of defendant were taken into custody. The trunk was opened and found to contain 7 garbage bags containing a total of approximately 163 pounds of a green leafy substance.

At the time the sheriff first saw the suspected marijuana protruding from the damaged trunk of the 1977 Mercury there had been no conduct by any law enforcement personnel which amounted to an intrusion to the defendant's reasonable expectation of privacy. Compare Coolidge v. New Hampshire, 403 U.S. 443, 464 (91 SC 2022, 29 LE2d 564), where four criteria authorizing a plain view search are discussed. But the case sub judice does not involve the "plain view doctrine" insofar as that concept involves the premise of an initial intrusion. It is the initial intrusion which gives rise to the requirement of satisfying these four criteria. See Coolidge v. New

Hampshire, 403 U.S. 443, 466, supra. The sheriff's conduct in driving past the suspect vehicle in the parking lot of a gas station open to the public did not amount to intrusion of defendant's reasonable expectation of privacy. The sheriff had a right to be where he was when he saw the suspected marijuana in the trunk of the car and this information provided probable cause for search of the vehicle. As the Mercury was still being towed after having been towed for many miles from Forsyth, Georgia, to Ashburn, Georgia, and thus remained mobile despite its damaged condition from the collision, its mobility supplied the exigent circumstances which authorized search of the vehicle without a warrant. Carroll v. United States, 267 U.S. 132 (45 SC 280, 69 LE 543); Chambers v. Maroney, 399 U.S. 42 (90 SC 1975, 26 LE2d 419).

At the motion to suppress hearing and at all subsequent stages of the case sub judice, the defendant has questioned the credibility of the sheriff as to whether he actually saw any marijuana in plain sight prior to stopping the vehicle and opening the trunk. Defendant draws attention to the testimony of the wrecker driver, an Ashburn police officer, and a state trooper, all of whom had been in close proximity to the vehicle and testified that they never saw any marijuana prior to the trunk being opened.

It should be noted that the sheriff, in pursuing the anonymous telephone tip, was the only person who approached the vehicle specifically looking for some tell-tale signs of criminal activity while the wrecker driver was innocently employed to tow the vehicle. The Ashburn police officer was called to the scene after the sheriff had determined that probable cause

and exigent circumstances existed so as to authorize an immediate search of the vehicle. The state trooper had investigated the motor vehicle collision at Forsyth, Georgia, in which defendant's vehicle was damaged. Neither of the three supposedly contradictory witnesses gave any testimony as having specifically examined the vehicle for tell-tale signs of marijuana at the same time that the sheriff was doing so. This question of credibility is one of fact for the trial court to determine on the motion to suppress hearing and for the jury at trial. It is noted that during the hearing of her motion to suppress defendant admitted she knew the marijuana was in the automobile trunk and at the scene of the collision at Forsyth, Georgia, she took measures to secrete the presence of the marijuana "[b]ecause I didn't want anybody to see it."

3. Defendant contends that the testimony of the Ashburn police officer that he did not see any marijuana in plain sight was exculpatory and should have been disclosed to the defendant pursuant to Brady v. Maryland, 373 U.S. 83 (83 SC 1194, 10 LE2d 215). The police officer was called as a rebuttal witness on the motion to suppress hearing and this supposedly exculpatory evidence was elicited on cross examination at that hearing. This supposedly exculpatory evidence, although providing no support to the state's case, also fails to refute it. Defendant has failed to show that the state has withheld any exculpatory material in its possession. See Simmons v. State, 152 Ga. App. 643 (1) (263 SE2d 522). Even if the police officer's testimony is viewed as exculpatory, the defendant has failed to carry her burden of showing that a denial of this information so impaired her defense that she was denied a fair

trial. See Howard v. State, 144 Ga. App. 208, 211 (4) (240 SE2d 908).

4. While the green leafy substance found in the trunk of defendant's automobile was in the custody of the sheriff and prior to any samples having been taken for chemical analysis, the materials were first stored in a cell in the jail and later transferred to a padlocked building located a few feet away from the jail. At approximately 2:30 a.m. on November 9, 1979, the storage building was broken into and 4 of the 7 bags of a green leafy substance were taken. It was not until that afternoon that the theft of the 4 bags of material was discovered. The stolen bags of material were subsequently recovered and the perpetrator testified at trial that he had not bothered the 3 bags of material which had been left behind. The 4 bags of material which had been stolen, upon recovery, were marked to differentiate them, and

evidence as to the nature of the contents of those bags was not permitted into evidence. Moreover, the trial court instructed the jury to disregasrd all evidence pertaining to any marijuana which the jury found was stolen and to disabuse their minds of any evidence pertaining to any alleged marijuana which was the subject matter of any burglary. The defendant submits that the chain of custody as to the 3 bags which were left behind was broken and argues in support of this contention that the door of the evidence building lay open to anyone during the period between the theft and the discovery thereof, a period of some 12 hours.

The standard by which the chain of custody must be reviewed is that "it must be shown with reasonable certainty that there has been no alteration or substitution of the item. And, in such a case the test of reasonable certainty is not met where

there is missing a vital link in the chain of possession of the item. See, 29 AmJur2d 844, Evidence, § 754; Robinson v. Commonwealth, 212 Va. 136 (183 SE2d 179). Factors to be considered in making a determination of whether physical objects connected with commission of a crime are substantially in the same condition as when the crime was committed, so that they can be admitted into evidence, ... [are] ... the nature of the article, circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with it. If upon consideration of such factors the trial judge is satisfied that in reasonable probability, the article has not been changed in important respects, he may permit its introduction into evidence." Epps v. State, 134 Ga. App. 429, 433 (214 SE2d 703).

Although the precautions taken by the law enforcement officials to preserve and protect the evidence from tampering were

compromised to some degree, it remains very unlikely that an intermeddler altered the remaining evidence. The hypothesis that the remaining 3 bags of evidence were altered requires the acceptance of a theory that some intermeddler obtained knowledge of the accessibility to the remaining 3 bags of evidence, made possible due to the breaking open of the storage building during the theft, then took 60 pounds or more of marijuana, packaged it in similar garbage bags to those in which the legitimate evidence existed and then made a switch. It is most unlikely that someone would have the knowledge, motive and resources to accomplish all of this. This, of course, is no more than to acknowledge that as the quantity of such seized materials increases the likelihood and practicality of any effective tampering decreases due to the scale of the project. We find no abuse of discretion in the trial court's determin-

ation that the reasonable probability existed that the remaining 3 bags of evidence had not been changed in any important respect. The trial court did not err in admitting evidence testimony as to the nature of the contents of the 3 bags of evidence left behind in the storage building after the theft.

5. Defendant contends that the trial court erred in failing to grant her motion to dismiss based on the state's intentional destruction of physical evidence. Defendant argues that she was denied her due process rights when the alleged marijuana and the garbage bags in which it was contained were destroyed pursuant to an ex parte order of the trial court.

As to the green leafy substance contained in the garbage bags a sample of about 2 1/2 pounds was taken from each bag of material prior to the destruction of the

remainder. As these samples were tested and found to be marijuana by the State Crime Laboratory it is obvious that the destruction of this contraband cannot be viewed as the suppression of any evidence favorable to the accused. Compare Brady v. Maryland, 373 U. S. 83, supra. Nor is the best evidence rule applicable to this situation. Willingham v. State, 134 Ga. App. 603, 606 (3) (215 SE2d 521).

As to the garbage bags in which the marijuana was contained, defendant argues that the bags themselves would have refuted the arresting sheriff's testimony that the bags were torn so as to allow portions of the green leafy substance to be seen by the sheriff as he passed near the defendant's vehicle prior to the arrest. As stated above, the best evidence rule is inapplicable to these circumstances so that the primary issue presented by this contention is whether defendant's due process rights

have been violated. We note that the destruction of the bags and their contents did not occur until several months after the date of the motion to suppress hearing so that the bags were available at that date if in fact defendant had the desire to present such evidence. Photographs of the bags were presented in evidence at the trial. Those photographs were sufficient to demonstrate to the jury the condition fo the bags insofar as whether they were torn. We find that the defendant has failed to show how her case has been prejudiced by the destruction of the bags. This enumeration of error is without merit.

Judgment affirmed. Quillian, C. J., and Pope, J., concur.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

FILED

at 5:55 p.m.

NOV - 7 1980

/s/Nelson F. Newberry
Deputy Clerk, U.S.
District Court,
MIDDLE DISTRICT OF
GEORGIA

| | | |
|---|---|---|
| MARY JUNE SPEIGHT, | : | |
| | : | |
| Petitioner, | : | CIVIL NO. 80-93-ALB |
| | : | |
| V. | : | |
| | : | |
| LAMAR WHIDDON, | : | |
| Sheriff, | : | |
| Turner County, | : | |
| Georgia, | : | |
| | : | |
| Respondent. | : | |
| | : | |

O R D E R

The petitioner, unable in the state courts to secure an order setting an appeal bond pending disposition of her state appellate remedies, moves the court to grant her bail. Petitioner is presently incar-

cerated in the Turner County jail and has served approximately two months of her three year sentence for possession of more than one ounce of marijuana in violation of Ga. Code Ann. § 79A-811 (j).

Following petitioner's conviction and sentencing on September 10, 1980, the trial court denied petitioner's request for an appeal bond to be set on September 12, 1980. A timely notice of appeal was filed on September 22, 1980. On September 25, 1980, the Georgia Court of Appeals reversed the trial court's denial of bond. Pursuant to the order of the Court of Appeals, the trial court on October 9, 1980, entered new findings of fact and conclusions of law denying petitioner's request for an appeal bond to be set. The Georgia Court of Appeals affirmed the trial court on October 15, 1980. The Supreme Court of Georgia denied certiorari on the bond issue on October 28, 1980. All possible state remedies

as to the issue of bail pending appeal have, therefore, been exhausted.

Petitioner's statement of facts in support of her motion is as follows:

> "Petitioner's car was involved in an eight car wreck in Monroe County, Georgia on the evening of October 11, 1979. Petitioner's 1977 Mercury was hit in the rear. The damage to the car made the car undriveable. A truck hit the rear quarter panel, buckling and pushing up the trunk lid but not springing it. There was a hole in the passenger side of approximately 8 x 12 inches. Petitioner hired a wrecker service to tow her car to Ashburn, Turner County, Georgia, where her sister lived. The Monroe County Police and Georgia State Patrol came to the scene of the accident but did not arrest Petitioner for any crime or apparently suspect anything.
>
> At approximately 9:30 p.m. on October 11, 1979, the Sheriff of Turner County said he received an anonymous phone call that a car involved in the Monroe County wreck was going to be towed 'through Ashburn'. The Sheriff testified the caller said that:
>
> > There would be a 1977 gray Mercury being towed back through this county with a rear end collision and it would be <u>loaded with junk</u>. (emphasis added).

The Sheriff said that he understood 'junk' to mean 'some kind of drug.'

As to the identity of the caller, the Sheriff said: 'I didn't tell them who I was and I didn't ask who I was talking to.' As to the reliability of the anonymous tip, the Sheriff said:

> I didn't think too much of it at first. When I called Monroe County, and they had an eight-car pile-up, then it created some suspicion, yes.

Nevertheless, the Sheriff went for the express purpose to investigate. The Sheriff parked at Highway 159 and I-75 until 11:30 p.m., when he finally spotted the car in tow. The Sheriff said that from his seat in the patrol car he could see therein 'three plastic bags torn with sprigs of green leafy substance sticking out.' The Sheriff said he could see the substance from inside his car, even though the car was being towed from the rear. The Sheriff said it 'resembled marijuana'. The Sheriff viewed the car as it was pulled over at a service station near the exit where Petitioner was making a telephone call. At that time, the Sheriff asked her is she was lost, and Petitioner replied 'No.' Even though he said he saw marijuana, he did not arrest or question Petitioner further because:

> 'There were two people besides the wrecker driver, and I was by myself, and I

> didn't want to take the chance of either one getting away. They had already stated they were going into town. So, I decided to wait until I got into town and get some help from the City.'

The Sheriff let the tow truck proceed to Ashburn, where he stopped it. As the sheriff apprehended the car, he pulled a sprig out of one of the bags, smelled it and then 'suspected it being marijuana'. The Sheriff said he didn't have to reach inside the trunk because the bags were bulging out of the trunk. The Sheriff said the sprigs sticking out were very easy to see and 'real obvious'. The car was then towed to the jail, where it was searched further and seven bags of marijuana were found in the trunk.

The Sheriff testified that there was no warrant or consent to search. As for the bags the marijuana was in, the Sheriff said, 'You couldn't see through them, only they were torn.'

In rebuttal, the defense called the tow truck driver. The tow truck driver testified that at no time had he ever seen or smelled marijuana in the car. He said he looked at the rear of the vehicle and even hooked up the tow bar to the rear of the car. The wrecker driver said the hole in the trunk was 3 inches wide, but that a hole in the passenger side of the car was 10 - 15 inches

wide. He said he saw an overnight bag through the hole. He emphasized he never saw or suspected any marijuana: 'I wouldn't have been pulling it if I had.' When the police stopped his truck in Ashburn, the wrecker driver said that one of the officers said: 'I knew it was in there, because I could smell it from way back here.' The officers had a flashlight and they pulled a bag out of the hole. The driver still did not see any marijuana until 'they pulled out a green trash bag sitting in the - right there, and pulled the top open on it.' The Petitioner was then placed under arrest. A full search was not conducted until the car was towed to the jail where the locked trunk was opened for the first time.

After the testimony from the wrecker driver, the prosecutor asked for a recess: 'In view of the testimony that's come out, I would like to see about possibly getting some rebuttal witneses.' The Sheriff then tried to buttress his own testimony oncerning his contention that the marijuana was highly visible, with sprigs bulging from the trunk. The Sheriff said:

> 'I asked her how in the hell she got through an eight-car pileup with that stuff showing like it did and an officer walking around writing the report. She told me that she would throw her jacket over the hold [sic] when he would walk up to the car. I said, "What about when he

would go to the other side? She said, "I would walk around there and throw it over the other side."

The prosecutor also called Officer Larry Barfield as a rebuttal witness. Barfield testified that he pulled the tow truck and car over and that he and the Sheriff walked up to the rear of the car together. Barfield said at that time he did not see any marjuana - even though he had his nose 'right down on it'. Barfield said that marijuana was not found until the car was towed to the jail and searched. He said that neither did the Sheriff say anything about seeing marijuana. Barfield said he was familiar with marijuana, having seen it a 'thousand times'. Barfield said the marijuana was 'discovered' because when they stopped the car they investigated and smelled marijuana.

'We walked to the back of the wrecker and looked around the car and smelled a strong odor back there. The trunk was bowed open where it had been hit and I told the Sheriff, 'This smells like marijuana', you know, 'here at the back' which they was green trash bags and you could see clear like there. I put my nose, my head, down there to where the trunk was bowed open and the Sheriff did too and he said he believed it was marijuana too. We told the wrecker driver and all of them to come up to the jail

> house, follow us up to the jail house.'
>
> Even though he said he smelled it, he did not see any marijuana until after a complete search of the car at the jail."

Petitioner further shows that she was previously released on bond following her October 11, 1979, arrest; that she has voluntarily appeared at all court appearances; that this is her first conviction; and that, following the conviction, the state interposed no objection to her motion to the trial judge for bail pending appeal to be set.

Petitioner is twenty-six years old and has been a resident of Wilton Manors, Florida for approximately five years. She is married and has a nine year old son.

The initial determination for the court is whether a state prisoner can petition this court for habeas corpus relief solely on the question of bail pending exhaustion

of state remedies on the merits of her conviction and sentence. The court finds that such relief is authorized. In Dawkins v. Crevasse, 391 F.2d 921 (5th Cir. 1968), the Fifth Circuit Court of Appeals held that the petitioner's appeal to the state appellate courts was not so lacking in merit or frivolous as to warrant denial of bail pending appeal. In Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968), the court of appeals reached a similar result adding that a failure to grant bail where petitioner was sentenced to a 120-day jail term would render ineffective his direct appeal, in that his sentence would have been served by the time the state courts could act. Finally, in Calley v. Callaway, 496 F.2d 701 (5th Cir. 1974), the court of appeals held that bail should be granted to a military prisoner pending postconviction relief where the prisoner has raised substantial constitutional claims upon which

he has a higher probability of success, and also when extraordinary or exceptional circumstances exist which makes the grant of bail necessary to make the habeas remedy effective. District courts within Georgia have concluded that a one year sentence for selling marijuana, Goodman v. Ault, 358 F. Supp. 743 (N.D. Ga. 1973); and a three year sentence for possession of marijuana with intent to distribute, Gilleland v. Stynchcombe, C.A. No. 76-346A (N.D. Ga. June 4, 1976), have been held to present exceptional circumstances justifying the district court's determination of an appropriate bond.

On the question of whether the appeal taken by petitioner is frivolous, the court need not answer the question, because in the state trial court's order of October 9, 1980, the trial judge concluded that an appeal taken by petitioner would not be frivolous or taken for delay only. The

court agrees with this determination of the state trial judge. For example, petitioner's allegation of Fourth Amendment violations presents for state appellate review substantial questions such as whether the Sheriff possessed the probable cause necessary to instigate the search, See, Zurcher v. Stanford Daily, 436 U. S. 547, 98 S. Ct. 1970, 56 L.Ed.2d 525 (1978); whether this automobile search falls within one of the exceptions to the constitutional concept requiring search warrants, See, Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); whether one in possession of contraband stored in green, opaque, garbage bags is entitled to an "expectation of privacy", See, Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); and whether the contents of the plastic bags were in "plain view," thereby obviating the need for a warrant, See, Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067

(1968).[1] The existence of these questions amply supports the state trial judge's determination that petitioner's appeal is not frivolous or taken for delay.

A second reason requires this court to review the state court's denial of bond pending appeal. While this district court does not like to oversee or interfere with state courts in matters pertaining to bail pending appeal, such supervision is nevertheless demanded when a state implements a procedure for the determination of bail, and a petitioner files for habeas corpus

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1. In examining under Dawkins, Boyer, and Calley, supra, whether bail should be granted pending state appellate remedies, the court must be careful not to decide the merits of petitioner's state appellate claims. The inquiry is not whether a defendant would prevail on state appeal, but whether a reviewing court, either the state appellate courts or the Supreme Court, could rule favorably upon petitioner's appellate claims. See, Gilliland, et al. v. Stynchcombe, supra. To attempt to hold otherwise would effectively strip the state appellate courts of their powers of direct appellate review.

relief in this court claiming that the State, in failing to follow its own procedures, violated her due process rights under the Fourteenth Amendment. See, United States, ex rel. Walker v. Twomey, 484 F.2d 874 (7th Cir. 1973); United States, ex rel. Means v. Solem, 440 F.Supp 544 (S.D. S.D. 1977); Finetti v. Harris, 460 F.Supp. 1069 (S.D. N.Y. 1978). In Birge v. State, 238 Ga. 88, 230 S.E.2d 895 (1976), the Supreme Court of Georgia adopted a procedure for the trial judges of Georgia to follow in considering applications for bail pending appeal. The four-factor test delineated by that court provides:

> "Release should not be granted unless the court finds that there is no substantial risk the appellant will not appear to answer the judgment following conclusion of the appellate proceedings and that the appellant is not likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice, and that the appeal is not frivolous or taken for delay." ID, at 897.

The rule adopted by the Georgia courts

combines the standards applied by the federal courts as codified in 18 U.S.C.A. § 3148 with the standards recommended by the American Bar Association found in ABA Standards, Criminal Appeals § 2.5(a) and (b) (1974).

In reviewing the order of the state trial judge, the court must determine whether the state trial judge's conclusions that petitioner would flee the jurisdiction of the court and that she would pose a substantial danger to others in the community, were arbitrary and not supoported by the facts presented. See, United State ex rel Walker v. Twomey, supra. The court finds that each conclusion is arbitrary and unwarranted under the facts. In each case the state trial judge merely assumed that one convicted of crime and sentenced to serve three years in prison, who lives outside the state of Georgia, will not return

to the state upon exhaustion of appellate remedies, or that one who possesses a "huge amount of marijuana" is more likely to present great risks to the public. Both assumptions are in the present case conclusory and not based on fact. While the court in Birge placed the burden of seeking release pending appeal upon the appellant, the court noted that a trial judge may consider all the evidence adduced at trial that is pertinent to such a determination in addition to such other oral and documentary evidence that he may consider appropriate. Birge, supra. In the instant case the trial judge did not consider petitioner's prior appearances, the fact that she had no prior convictions, or the willingness of her brother to post as security for a bond his home and his business. The court likewise could have questioned the petitioner at the bail hearing on any matter which would has assured the court that she would return to the jurisdiction

of the court following exhaustion of appellate remedies or that she would not pose a risk to the public. See, United States v. Hawkins, 617 F.2d 59 (5th Cir. 1980); United States v. Miranda, 442 F.Supp. 786 (S.D. Fla. 1977), rev'd on other grounds, 593 F.2d 590 (5th Cir. 1979). In sum, the order of the state trial judge served to arbitrarily deny petitioner the right to have an appropriate bail set in accordance with state law.

Having concluded that petitioner is at least entitled on direct appeal to raise substantial Fourth Amendment questions, which if successfully argued on appeal would require a new trial on the merits of her case, and that petitioner is entitled to have her motion for bond pending appeal decided in a non-arbitrary fashion, the court must allow petitioner's motion for release pending exhaustion of her state and federal remedies. The question of the

amount of bond would be more appropriately determined by a United States Magistrate.

Petitioner's motion for release pending exhausion of her state remedies is therefore GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Respondent deliver and release the petitioner to the custody of the United States Marshal at 11:00 a.m., Monday, November 10, 1980, at the United States Courthouse in Macon, Georgia, and

IT IS FURTHER ORDERED that the United States Marshal present the petitioner before a United States Magistrate for the setting of a reasonable appeal bond.

SO ORDERED, this the 7th day of November, 1980.

/s/Wilbur D. Owens, Jr.

Wilbur D. Owens, Jr.

United States District Judge

APPENDIX F

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta Oct. 28, 1980

Dear Sir:
Case No. 36894. Speight v. State

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX G

Court of Appeals

of the State of Georgia

ATLANTA, October 15, 1980

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

61073. Mary J. Speight v. The State

Upon consideration of the order of the Superior Court in this case denying the defendant's motion for supersedeas bond pending appeal entered on October 9, 1980, it is ordered that the motion to set reasonable supersedeas bond filed in this court on October 14, 1980, be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta OCT 15 1980

I certify that the above is a true extract from the minutes of the Court

of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

/s/ Morgan Thomas

APPENDIX H

IN THE SUPERIOR COURT OF TURNER COUNTY

STATE OF GEORGIA

| | | |
|---|---|---|
| STATE OF GEORGIA | § | |
| | § | |
| VS. | § | INDICTMENT NO.: 4823 |
| | § | |
| MARY JUNE SPEIGHT | § | |

ORDER

This Court, after the trial and conviction of defendant (appellant) held a hearing upon her Motion For Supersedias Bond Pending Appeal. This Court denied said motion and in its' order set out its' reasons. The Court of Appeals thereafter remanded this case for reconsideration and directed this Court to comply with the standards and determinations set forth in Birge v. State, 238 GA 88; Chatham v. State 153 GA App. 483; and Moore v. State, 151 GA App. 413.

This Court respectfully suggests that its' prior Order does comply with Birge which holds that the burden of seeking a stay of execution and release is upon appellant and that "Release should not be granted unless the Court finds that there is no substantial risk the appellant will not appear to answer the judgment following conclusion of the appellate proceedings and that the appellant is not likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice and that the appeal is not frivolous or taken for delay."

It would appear that if the defendant (appellant), for instance, failed to carry the burden of having the Court find there is no substantial risk that she will not appear to answer the judgment following appeal then release should not be granted. In that event, it would appear unnecessary for the trial court to determine whether

the defendant had carried the burden of having the Court find each of the other three condisions for release to exist.

It is respectfully suggested that in Chatham v. State, 153 GA. App. 483; Moore v. State, 151 GA App. 413 and White v. State 146 GA App. 147, the Court of Appeals has enlarged upon the requirements set forth by the Supreme Court of Georgia in the Birge case.

In these three cited cases, the Court of Appeals requires the trial court to address all of the following four questions: "(1) Is there a substantial risk the appellant will flee?, (2) Is there a substantial risk the appellant will pose a danger to others in the community?, (3) Is there a substantial risk the appellant will intimidate witnesses or otherwise interfere with the administration of justice?, and (4) Does it appear the appeal was frivolous or was taken only for purposes of delay?

With reference to the first question, for instance, required by the Court of Appeals, it is a heavier burden for the trial court to have to affirmatively find there "is a substantial risk the appellant will flee" than for the Court to simply be "unable to find that there is no substantial risk the appellant will not flee" as contemplated by Birge. It also does not appear that Birge would require an affirmative answer to questions (2), (3), and (4) required by the Court of Appeals in the above Chatham, Moore, and White cases.

It is respectfully suggested that it is difficult to understand if the defendant is unable to carry the burden required on any one of the conditions which she must meet in order to be released, why all the other questions must be addressed.

Having said this, this Court will respectfully try to comply with the directions of the Court of Appeals and answer

the four required questions as follows:

QUESTION (1): Is there a substantial risk the appellant will flee? The Court's answer is "yes." Being from outside of the state (Minnesota) and a sentence of three years imprisonment being imposed, the defendant woud be under much more pressure to flee than simply to appear for trial. The defendant was caught with an unusually large amount of marijuana and the Court has observed that persons engaged in heavy drug cases often fail to appear to answer to the Courts. Furthermore, while the defendant did testify at the bail hearing (she did not testify at the trial in which she was convicted) she at no time assured, or attempted to assure, or even promise the Court that she would return to answer the judgment following the appeal. The burden was upon her in seeking a stay of execution and release on bail.

QUESTION (2): Is there a substantial

risk the appellant will pose a danger to others or to the community? The answer is "yes" to this question.

Although, technically charged with "possessing more than 1 ounce of marihuana" the evidence adduced during trial was that she possessed a huge amount of marihuana in her car. The bags located in the trunk of her car contained about 150 lbs. of what appeared to be marihuana and from some of which bags several pounds were introduced in evidence and determined by an expert witness to be marihuana. The Court's experience with people caught with large amounts of drugs such as marihuana after conviction present great risks to the public, and the Court finds that there is a substantial risk the appellant will pose a danger to others and to the community pending appeal if she should be released on bail.

QUESTION (3): Is there a substantial

risk the appellant will intimidate witnesses or otherwise interfere with the administration of justice? The answer is "no" to this question.

QUESTION (4): Does it appear the appeal was frivolous or was taken only for purposes of delay? While this Court does not believe there are any good grounds for appeal and knows of no errors in the trial, it was a lengthy trial with many objections made and many rulings by the Court, and the Court would not go so far as to say the appeal is frivolous or that it was made for delay only. So the answer to this question is "no."

THEREFORE, defendant's Motion for Supersedeas Bond Pending Appeal is denied.

This 9th day of October, 1980.

/s/J. Bowie Gray
Senior Judge, Superior Courts
Presiding in Turner Superior
Court.

APPENDIX I

Court of Appeals
of the State of Georgia

ATLANTA, September 25, 1980

The Honorable Court of Appeals met pursuant to adjournment.
The following order was passed:

61073. MARY JUNE SPEIGHT v. STATE OF GEORGIA. Sh-2

It is hereby ordered that this case be remanded to the trial court for reconsideration of the issue of a supersedeas bond for appellant, and, if it is determined that she be granted bond, that it be set in a reasonable amount; and that in the reconsideration of this case the court be guided by the standards and determinations as set forth by the appellate courts in Birge v. State, 238 Ga. 88 (230 SE2d 895); Chatham v. State, 153 Ga. App. 483 (265 SE2d 835);

and Moore v. State, 151 Ga. App. 413 (260 SE2d 350).

The trial court is further directed to address the issue of whether or not the appeal is friviolous or taken for the purpose of delay.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta SEP 25 1980

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK

/s/Morgan Thomas,